Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC, an unincorporated voluntary association; RON PEDEE, and WILLIAM P. SPIETH,
Petitioners,

vs.

CITY OF BELLEVUE, a municipal corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

1411 Fourth Avenue Building
Suite 910
Seattle, WA 98101
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QUESTION PRESENTED

May a state court, disregarding both Maher v. Gagne, 448 U.S. 122 (1980), and the legislative history of the Civil Rights Attorney's Fees Act of 1976, deny an award of attorney's fees under 42 U.S.C. § 1988 to plaintiffs whose success on a state statutory claim renders it unnecessary for the court to reach the plaintiffs' substantial federal constitutional claims arising out of a common nucleus of operative fact?

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Petitioners,

v.

CITY OF BELLEVUE, a municipal corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

The petitioners Bellevue Fire Fighters Local 1604, International Association of Fire Fighters, AFL-CIO, CLC, Ron Pedee and William P. Spieth, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Washington entered herein on January 12, 1984.

OPINION BELOW

The opinion of the Supreme Court of Washington (App. 1a-19a)[1] is reported at 100 Wn.2d 748, 675 P.2d 592.

JURISDICTION

The opinion of the Supreme Court of Washington (App. 31a-32a) was filed on January 12, 1984. Petitioners' motion for reconsideration was denied on August 21, 1984 (App. 30a). The time for filing a petition for writ of certiorari was extended by Justice Rehnquist to and including December 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

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[1]"App." refers to the appendix hereto.

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 274, codified as amended in 42 U.S.C. § 1988, provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

1. Factual Background.

The City of Bellevue, Washington, sought to limit the political activities of its employees by adopting Section 3.90.050 of the Bellevue City Code (BCC), which read:

> B. No city employee shall take an active part in the political management or political

> campaign of a candidate for a position on the Bellevue City Council.
>
> C. Nothing in this section shall prevent an employee from fully exercising those rights to participate in political activities granted by the provisions of RCW 41.06.250.

This provision was adopted by ordinance in 1977 as part of the city's "Code of Ethics." Violation of the Code of Ethics is punishable by civil and criminal sanctions, as well as by suspension and discharge from City employment. BCC 3.90.060.[2]

In preparation for the 1981 elections for Bellevue City Council positions, on June 5, 1981, the Bellevue City Manager issued a directive interpreting BCC 3.90.050. In the directive, City employees

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[2]BCC 3.90.060 is set forth in the First Amended Complaint at App. 35a-36a.

were instructed not to "actively participate" in the City Council elections. "Actively participate" was defined as:

> [D]oorbelling, distributing literature, attending strategy meetings of candidates, meeting with individual candidates, and any other participation which leaves the impression or gives the appearance of favoring a particular candidate(s).

C.P. 90 (Affidavit of Andrea Beatty (attachment)) (emphasis added).[3]

The Bellevue Fire Fighters and individual petitioners[4] commenced this action in the Superior Court of the State of Washington for King County on October 5, 1981, alleging that BCC 3.90.050 violated

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[3]"C.P." refers to "Clerk's Papers," which constitute the record before the court below.

[4]The individual petitioners are Ron Pedee, then a captain in the Bellevue Fire Department, and William P. Spieth, a registered voter not employed by the City.

RCW 41.06.250[5] and the free speech and association guarantees of the United States

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[5]"RCW" refers to the Revised Code of Washington. The statutory protection provided by RCW 41.06.250 is as follows:

> (2) Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices.
>
> * * *
>
> (5) The provisions of this section shall supersede all statutes, charter provisions, ordinances, resolutions, regulations, and requirements promulgated by the state or any subdivision thereof, including any provision of any county charter, insofar as they may be in conflict with the provisions of this section.

and Washington State Constitutions. The petitioners also asserted that the statute and the ordinance, if construed to prohibit nonpartisan political activities while protecting partisan activities, would violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. Finally, petitioners sought relief pursuant to 42 U.S.C. §§ 1983 and 1988. See App. 33a-42a.

Elections for positions on the Bellevue City Council are nonpartisan under RCW 35A.29.100. Elections are held in odd-numbered years, and candidates are nominated by petitions that may be signed regardless of political party affiliation. No party affiliation appears on the ballot. By contrast, state and county government elections in Washington are partisan. RCW 29.18.010.

On October 12, 1981, one week after this lawsuit was filed and two days prior to a scheduled hearing on petitioners' request for a preliminary injunction, the city manager issued a supplemental memorandum, purporting to narrow the application of the ordinance.[6]

2. The Rulings of the Superior Court.

The Superior Court issued a preliminary injunction against the enforcement of the ordinance. The court concluded not only that BCC 3.90.050(B) conflicted with RCW 41.06.250, but also that the ordinance and the June 5 directive violated the free speech and association guarantees of the state and federal constitutions. C.P. 109-115.

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[6]The October 12 memorandum is set forth, in pertinent part, in the opinion below at App. 14a-15a.

At trial, however, the Superior Court ruled that the defects were cured by the city manager's October 12 memo. The trial judge construed RCW 41.06.250 as granting to public employees the right to run for partisan offices and to participate in the management of partisan campaigns, but did not protect the same participation in non-partisan campaigns. The trial judge also ruled that the ordinance, as interpreted by the city, was justified by and directly related to compelling governmental interests and thus infringed on no constitutionally protected rights. Finally, having ruled for the respondent City on all issues, the trial court did not address petitioners' entitlement to attorney's fees under 42 U.S.C. § 1988. App. 20a-29a.

3. The Opinion of the Washington Supreme Court.

The Supreme Court of Washington accepted direct review of the judgment of the superior court and reversed.[7] The state supreme court held that the ordinance is preempted by the express terms of RCW 41.06.250(5), which "affirms the right of employees of this state and its subdivisions to participate fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices" (App. 16a-17a).

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[7]Due to the impending city council elections, the state supreme court accepted the suggestion of counsel for petitioners at oral argument and on October 21, 1983, issued an order invalidating the ordinance and enjoining its enforcement, with opinion to follow.

The Washington Supreme Court declined to reach the state and federal constitutional challenges raised by petitioners, explaining as follows:

> Appellants also raise a number of constitutional challenges. They charge that BCC 3.90.050(B) not only violates the free speech and association guarantees of the state and federal constitutions, but is also unconstitutionally vague and overbroad. Moreover, they urge that if RCW 41.06.250 protected the right to participate in partisan, but not nonpartisan campaigns, it would violate the privileges and immunities clause of our state constitution, and the equal protection clause of the federal constitution. In view of our holding that RCW 41.06.250 preempts BCC 3.90.050(B), we need not and do not reach these constitutional issues.

App. 17a-18a.

Having so held, the Supreme Court of Washington denied petitioners' request for attorney's fees under 42 U.S.C. § 1988. The Court stated:

> Appellants have requested that we award nominal damages and reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1983, 1988 (1981). Section 1988 gives this court the discretion to allow the prevailing party in an action to enforce § 1983 a reasonable attorneys' fee. Section 1983 provides in relevant part that every person who, under color of any statute or ordinance, subjects any United States citizen to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the injured party in an action at law. The violation of rights guaranteed solely by the state constitution and state law is not actionable under § 1983. Shutt v. Moore, 26 Wn. App. 450, 453, 613 P.2d 1188 (1980). Since our decision is based solely upon the ground that BCC 3.90.050(B) violated RCW 41.06.250, appellants' request must be denied.

App. 18a-19a. Petitioners' motion for reconsideration on the issue of attorney's fees under 42 U.S.C. § 1988 was denied without comment (App. 30a). The Washington Supreme Court thus considered and rejected the § 1988 claim for which petitioners seek review.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning a state court's authority to deny attorneys' fees under 42 U.S.C. § 1988 to plaintiffs prevailing on state law claims in cases involving substantial federal constitutional questions that the court justifiably declines to reach. The court's ruling is in direct conflict with this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980), and totally disregards the congressional purpose in enacting that provision: to stimulate private enforcement of the civil rights laws by providing fees even to parties who join a civil rights claim with statutory claims for which fees are not otherwise available. The decision below also conflicts with the decisions of every other state court of last resort and federal court of appeal to address this issue.

If allowed to stand, the decision below would raise serious policy concerns. Unless overturned, it would result in the unnecessary decision of federal constitutional questions. It would also encourage litigants wishing to recover their attorney's fees to bring civil rights cases with pendent state claims into federal court with the resulting congestion of the federal dockets, even though state court is the best forum to decide state law claims.

In these circumstances, the decision below should be vacated and the case remanded to the Washington Supreme Court for reconsideration in light of Maher. Alternatively, plenary review by this Court is warranted.

1. The Decision Below Disregards and is in Direct Conflict with the Decision in Maher v. Gagne, 448 U.S. 122 (1980).

In reliance upon what it believed to be the test for awarding attorney's fees in actions brought in state court under 42 U.S.C. § 1983, the Washington Supreme Court held that plaintiffs prevailing solely on state law claims in actions where substantial federal constitutional claims are not reached are not entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988. Such a result is proper, reasoned the court, because state statutory and constitutional claims are not actionable under § 1983.

In so holding, the decision of the court below raises an issue of vital importance to vindication of the civil rights laws and

is in direct conflict with the decision of this Court in Maher v. Gagne, 448 U.S. 122 (1980).

Maher squarely holds that an award of attorney's fees is appropriate in a case in which "the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim. . . ." 448 U.S. at 132. Indeed, this result is required by the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976.

Congress amended § 1988 in 1976 to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). The recovery of attorney's fees is essential, if private citizens are meaningfully to be able to assert their civil rights. The Senate Report states:

> [The] . . . civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies these laws contain.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Adm. News 5908, 5910.

In view of such legislative history, this Court has instructed that,

> a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render an award unjust.'" S. Rep. No. 94-1011, p. 4 (1976) (quoting from Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)).

Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).[8]

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[8]There can be no dispute that petitioners are prevailing plaintiffs within the meaning of 42 U.S.C. § 1988. They obtained not merely "essentially complete relief" (Hensley, 461 U.S. at 431), but complete

In enacting § 1988, Congress also stated its intention to provide attorneys' fees to parties who, like petitioners here, have joined a § 1988 claim with claims for which fees are not otherwise available. The Report of the House Judiciary Committee[9] expressly approved attorney's fee awards in circumstances identical to this case, in which a federal constitutional question is presented that the court finds unnecessary to resolve, because a nonconstitutional claim is dispositive.

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relief. The challenged ordinance was invalidated and its enforcement enjoined. Petitioners are therefore entitled to recover fees for the hours reasonably expended on the entire litigation. As the Court noted in Hensley at 435:

> Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters. (Emphasis added.)

[9]The committee report accompanied H.R. 15460, which was virtually identical to the Senate Bill that Congress finally enacted.

The House Committee determined that in such circumstances the prevailing party nevertheless should recover attorney's fees under § 1988, so long as the federal claim is substantial and the state and federal claims arise out of a common nucleus of operative fact. The House Report states:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. Morales v. Haines, 486 F.2d 80 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 (1974). In such case, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorney's fees

> may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, supra, at 725.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976).[10]

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[10]The "substantiality" test referred to by the Committee is met whenever a claim is made that a person has been deprived

> under color of State Law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States

(28 U.S.C. § 1343(3)), so long as the claim "alleged is not so patently without merit to justify . . . the court's dismissal for want of jurisdiction." Hagans v. Lavine, 415 U.S. 528, 542-43 (1974).

This case meets that test. The First Amendment prohibits municipalities from imposing restrictions on nonpartisan political activities of their employees. Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3d Cir. 1974), cert. denied, 419 U.S. 844; Arden v. Village of Oak Lawn,

This Court has recognized that this legislative history "makes it clear" (Maher v. Gagne, supra, 448 U.S. at 132 n.15) that Congress intended fees to be allowed in a case in which "the plaintiff prevails on a wholly, non-civil-rights claim pendent to a substantial constitutional claim. . . ." Id. Such a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without

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537 F.Supp. 181 (N.D.Ill. 1982); see Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977), cert. denied, 434 U.S. 1063; contra Wachsman v. City of Dallas, 704 F.2d 160 (5th Cir. 1983), cert. denied, 104 S.Ct. 537.

The facts relied upon by petitioners to support their federal and state allegations also meet the "common nucleus of operative fact" test set forth in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), and referred to by the congressional committee. The operative facts for both allegations were the promulgation and enforcement of respondent's ordinance prohibiting certain free speech and associational activities.

undermining the longstanding judicial policy of avoiding unnecessary decisions of important constitutional issues." Id. at 133, quoting Gagne v. Maher, 594 F.2d 336, 342 (2d Cir. 1979).

The only conceivable distinction between the decisions in Maher and in this case is the fact that in Maher the non-fee claim was based on a federal statute, whereas here the claim is based on a state statute. But this is a distinction without a difference. This Court has held that Congress intended the fee provision to apply in state as well as federal courts.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court affirmed the conclusion of the Maine Supreme Court that § 1988 is fully applicable to actions brought in state courts. The Court stated:

> Several States, participating as amici curiae, argue that even if § 1988 applies to § 1983 claims alleging deprivations of statutory rights, it does not apply in state courts. There is no merit to this argument. . . . Representative Drinan described the purpose of the Civil Rights Attorney's Fees Awards Act as "authoriz[ing] the award of a reasonable attorney's fee in actions brought in State or Federal courts." 122 Cong. Rec. 35122 (1976). And Congress viewed the fees authorized by § 1988 as "an integral part of the remedies necessary to obtain" compliance with § 1983. S. Rep. No. 94-1011, p. 5 (1976). It follows from this history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in federal or state court.

448 U.S. at 10-11 (footnotes omitted).

It also follows from the Supremacy Clause that the fee provision must be applied in the manner intended by Congress whether the action is brought in federal or state court. The congressional intent is clear that litigants successful on state

statutory claims should not be deprived of attorney's fees simply because the court justifiably abstains from resolving substantial federal constitutional claims.

Disregarding this clear legislative intent, the decision below limits recovery of fees under § 1988 to those plaintiffs who prevail on claims actionable under § 1983. Thus, the court erroneously held that petitioners must be denied an award of fees because the relief granted was based solely on their non-civil-rights statutory claim. As noted above, this Court in Maher flatly rejected such reasoning.

The Washington Supreme Court totally disregards the congressional purpose in enacting the fee provision in § 1988. Its decision never once mentions this Court's decision in Maher. Under these circum-

stances, the Court should grant the petition for writ of certiorari, vacate the decision below, and remand the case to the Washington Supreme Court for reconsideration in light of the legislative history and Maher.

2. The Decision Below Conflicts With the Decisions of Other State Courts of Last Resort and Federal Courts of Appeals As to the Proper Interpretation of 42 U.S.C. § 1988.

The Washington Supreme Court's interpretation of § 1988 also conflicts with that of every other state court of last resort and federal court of appeals to address the question presented by this case.

Directly contrary to the decision below, the Supreme Judicial Court of Massachusetts

in Draper v. Town of Greenfield, 384 Mass. 444, 425 N.E.2d 333 (1981), awarded attorney's fees under § 1988 to prevailing plaintiffs in a case in which the relief ordered was compelled by state statutory interpretation so that the state and federal constitutional claims were not reached. Finding that "[o]n this question the legislative history is quite specific," the Massachusetts court held that the fact "that the relief achieved by the plaintiffs was granted on statutory rather than constitutional grounds is no bar to their claim for fees under § 1988." Id., 425 N.E.2d at 339.

Similarly, the Supreme Court of Alabama reversed the denial of attorney's fees in Davis v. Everett, 443 So.2d 1232 (Ala. 1983), where the plaintiff succeeded on her state constitutional claim, but her substan-

tial federal constitutional and § 1983 claims were neither specifically granted nor denied. In so holding, the Alabama Supreme Court relied on the legislative history quoted by this Court in Maher and distinguished its earlier decision in Still v. Personnel Board of Jefferson County, 406 So.2d 860 (Ala. 1981), cited by the respondent city below, because the trial court there had specifically denied justiciability of the federal statutory claims and found the challenged provision constitutional as applied, thus "affirmative[ly] deny[ing the] federal grounds of relief." Davis, supra, at 1235, quoting Still, supra, at 862 (Jones, J., concurring specially).[11]

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[11]Other state court decisions relied on by respondent below are similarly distinguishable. Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (relief granted by lower court on federal constitutional claim overruled by U.S. Supreme Court in separate case); Robinson v. City of Rayton, 606 S.W.2d 460 (Mo. App. 1980) (§ 1983 claims resolved against plaintiff); Brown v.

Unlike Still, the petitioners here appealed the denial of their federal constitutional claims to the Washington Supreme Court. In denying fees solely because it did not reach those claims, the decision of the Washington court directly conflicts with the decisions of the Massachusetts and Alabama courts.

In addition, lower state appellate courts have awarded attorney's fees under

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Hornbeck, 54 Md. App. 404, 458 A.2d 900 (1983) (federal constitutional claim held not substantial).

The federal courts have expressly recognized the distinction, denying an award of attorney's fees in cases where the court affirmatively rules against the plaintiff on the federal constitutional claim. Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980); Russo v. State of New York, 672 F.2d 1014, 1022-23 (2d Cir. 1982); Reel v. Arkansas Dept. of Correction, 672 F.2d 693, 697-98 (8th Cir. 1982); Luria Brothers & Co. v. Allen, 672 F.2d 347, 356-58 (3d Cir. 1982); Bunting v. City of Columbia, 639 F.2d 1090, 1095 (4th Cir. 1981).

§ 1988 to plaintiffs prevailing on state law claims arising under a common nucleus of operative fact with substantial federal constitutional claims (Filipino Accountants' Association v. State Board of Accountancy, 155 Cal.App.3d 1023, 204 Cal. Rptr. 913 (3d Dist. 1983); City of Fort Gates v. Cathey, 665 S.W.2d 586 (Tex. App. 10th Dist. 1983), review denied); and at least one other state court of last resort in dicta has rejected the rule adopted by the court below (Johnson v. Blum, 58 N.Y.2d 454, 448 N.E.2d 449, 461 N.Y.S.2d 782 (1983)).

Finally, the decision below conflicts with numerous decisions of federal courts of appeals in which, having never reached the substantial federal constitutional claims because relief was granted on state law claims arising under a "common nucleus of operative fact," the court awarded the

prevailing plaintiffs their attorney's fees under § 1988. Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982), cert. denied, 103 S.Ct. 3115; Kimbrough v. Arkansas Activities Association, 574 F.2d 423, 426-27 (8th Cir. 1978); Seals v. Quarterly County Court, 562 F.2d 390, 393-94 (6th Cir. 1977).[12] Federal district courts likewise have adopted the rule. Belcher v. Mansi, 569 F.Supp. 379 (D.R.I. 1983); Allen v. Housing Authority of County of Chester, 563 F.Supp. 108 (E.D.Pa. 1983); Anderson v. Redman, 474 F.Supp. 511 (D.Del. 1979).

Because the decision of the Washington Supreme Court deviates from the overwhelming weight of both state and federal authority,

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[12]See also Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981) (pendent federal statutory claim dispositive; fees awarded under § 1988); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978) (same).

this Court should vacate the decision below and remand the case for reconsideration.

3. The Decision Below Raises Significant Policy Concerns.

Serious policy considerations require review of the Washington Supreme Court's decision. Unless overturned, the decision below could lead to the unnecessary development of federal constitutional law and raises significant federalism concerns.

First, the court's ruling could lead to unnecessary decision of federal constitutional questions. The legislative history of § 1988 expresses the clear congressional purpose to award attorney's fees to plaintiffs prevailing on dispositive non-civil-rights statutory claims. Such a result is essential to continue the longstanding

judicial policy to avoid unnecessarily passing on federal constitutional questions. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, concurring). Otherwise, as Congress and this Court in Maher have recognized, courts would be required, for purposes of attorney's fee determinations, to decide the constitutional questions raised in such cases, thus causing the unnecessary development of federal constitutional law under circumstances in which it has no bearing on the merits of the case.

Second, the decision below raises significant federalism concerns. Notwithstanding the congressional purpose for enacting the fee provision of § 1988 as recognized in Maher, the Washington Supreme Court refused to award attorney's fees

because a state statutory claim was dispositive. Yet if a distinction were to be drawn between state and federal statutory claims, most plaintiffs would have no choice but to bring their complaints to federal court, unnecessarily expanding and increasing the burden on the federal docket.[13]

In summary, the decision of the Washington Supreme Court is in direct conflict with the decision of this Court in

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[13]In fact, in the case of state defendants, plaintiffs seeking to recover their attorney's fees might even be precluded from litigating their state statutory claims. Under Pennhurst State School & Hospital v. Haldeman, 104 S.Ct. 900 (1984), such plaintiffs would be forced to litigate in federal courts only their federal claims, with the result, again, of the unnecessary development of federal law. Yet, but for the financial disincentives Congress sought to abolish by enacting § 1988, such cases could have been decided in state court on state law issues.

Maher, and collides with the purpose of Congress in enacting the Civil Rights Attorney's Fees Awards Act of 1976. It also conflicts with decisions of other state courts of last resort and federal courts of appeals. Finally, the problems of federalism raised by the decision below are significant. Review by this Court is therefore essential to ensure the effective implementation of the civil rights laws and consistent application of § 1988.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted, the decision below vacated, and the case remanded to the Washington Supreme Court for reconsideration in light of Maher.

Alternatively, the Court should grant the petition and set the case down for plenary review.

Respectfully submitted,

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December 1984

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC, an unincorporated voluntary association, RON PEDEE, and WILLIAM P. SPIETH,	)	No. 49257-3
Appellants,	)	EN BANC
v.	)	
CITY OF BELLEVUE, a municipal corporation,	)	
Respondent.	)	FILED: JAN 12 1984

BRACHTENBACH, J. -- This case is a challenge to § 3.90.050(B) of the Bellevue City Code (BCC), which provides with respect to nonpartisan elections for positions on the Bellevue city council:

> No city employee shall take an active part in the political management or political campaign of a candidate for a position on the Bellevue city council.

Pursuant to BCC 3.90.060, violation of BCC 3.90.050(B) is punishable by civil and

criminal sanctions. The offender may also be suspended or dischargd from city employment.

The Bellevue Fire Fighters Union, a Bellevue Fire Department captain, and a registered voter (appellants), filed suit against the City of Bellevue (City), contending that BCC 3.90.050(B) violated RCW 41.06.250 and the state and federal constitutions. The trial court upheld the ordinance, lifted a preliminary injunction against its enforcement, and dismissed the complaint. We reverse on the ground that RCW 41.06.250 preempts local regulation of employee participation in nonpartisan political campaigns.

RCW 41.06.250 provides in relevant part:

> (2) Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party

> office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices.
>
> . . .
>
> (5) The provisions of this section shall supersede all statutes, charter provisions, ordinances, resolutions, regulations, and requirements promulgated by the state or any subdivision thereof, including any provision of any county charter, insofar as they may be in conflict with the provisions of this section.

(Italics ours.)

Where statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. Human Rights Comm'n v. Cheney Sch. Dist. 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). Relying on this familiar rule, City contends RCW 41.06.250 plainly and unam-

biguously permits the political subdivisions of this state to prohibit employee participation in nonpartisan political campaigns. City's argument may be summarized as follows: the first sentence of RCW 41.06.250(2) affirms the right of employees of the state and its subdivisions to participate in partisan political campaigns. However, the second sentence does not affirm the right to participate in nonpartisan campaigns, but merely refrains from prohibiting such participation itself. Therefore, BCC 3.90.050(B), which prohibited City's employees from participating in the nonpartisan campaigns for Bellevue city council, did not conflict with RCW 41.06.250(2) and was not preempted by RCW 41.06.250(5).[1]

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[1]As City correctly points out, the Attorney General followed the same reasoning in concluding that RCW 41.06.250 permitted a municipality to bar its own employees from participating in campaigns

We are not persuaded. If, as City contends, the second sentence of RCW 41.06.250(2) serves only to give notice that the statute itself does not prohibit employee participation in nonpartisan campaigns, why include it at all? The first sentence of RCW 41.06.250(2) affirms the right of employees to participate in partisan campaigns; there is no need for a cautionary proviso that the statute does not prohibit participation in nonpartisan campaigns. On the other hand, the double negative contained in the second sentence ("nothing . . . shall prohibit") could just

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for nonpartisan offices. AGO 22 (1975). A construction placed upon an ambiguous statute by the Attorney General is entitled to considerable weight; however, it is not controlling. This court remains the final authority on the proper construction of a statute. Davis v. County of King, 77 Wn.2d 930, 933-34, 468 P.2d 679 (1970).

as easily be read as an inartfully drawn attempt to affirm the right to participate in nonpartisan campaigns. Thus, we cannot say that the second sentence of RCW 41.06.250(2), when read in context, plainly and unambiguously permits local regulation of employee participation in nonpartisan campaigns.

The primary objective of statutory construction is to carry out the intent of the Legislature. Where, as here, intent is not clear from the language of the statute, we may consider the legislative history. Department of Transp. v. State Employees' Ins. Bd., 97 Wn.2d 454, 645 P.2d 1076 (1982).

When first enacted as part of the State Civil Service Law, RCW 41.06.250 provided in relevant part:

> (2) Employees shall have the right to vote and to express their opinions on all political subjects and candidates, but shall not hold

> any political party office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit a classified employee from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for non-partisan offices.

Laws of 1961, ch. 1, § 25(2), p. 21.

In 1974, the Legislature added RCW 41.06.250(5), and amended RCW 41.06.250(2) as follows:

> (2) Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates ((~~, but shall not~~)) and to hold any political party office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit ((~~a classified~~)) an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices.[2]

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[2]Text added is underlined. Text deleted is lined out and shown between double parentheses.

Laws of 1974, 1st Ex. Sess., ch. 136, § 1, p. 400.

Thus, RCW 41.06.250 originally prohibited state employees from participating in partisan political campaigns; however, the right of state employees to participate fully in nonpartisan campaigns was protected by the proviso that nothing in the statute prohibited such participation. The 1974 amendments eliminated the ban on participation in partisan campaigns, extended the statute's protection to employees of the state's political subdivisions, and preempted conflicting law. The obvious legislative intent behind these amendments was to increase the ability of employees to engage in political activity.

Viewed in light of this intent, City's interpretation of RCW 41.06.250 breaks down. The second sentence of RCW 41.06.250(2)

originally served as a proviso protecting the right to participate in nonpartisan campaigns. By affirming the right to participate in partisan campaigns, the Legislature surely did not intend to transform this protective proviso into superfluous verbiage providing only that the statute itself does not prohibit participation in nonpartisan campaigns. It is far more consistent with the manifest legislative intent to expand employee rights to interpret the proviso as an inelegantly drafted attempt to reaffirm the right of state and subdivision employees to participate in nonpartisan campaigns.

City insists that the Legislature intended to grant to political subdivisions of the state the authority to regulate the political activity of their own employees. However, the legislative history of the

1974 amendments to RCW 41.06.250 shows that the Legislature expressly rejected proposed provisions which would have granted such authority. Acting on the recommendation of its Committee on Constitution and Elections, the House amended House Bill 474 to include provisions which would have reserved to any county, city or town the authority to prohibit or restrict any employee from engaging in, as a candidate or in the management of, any partisan or nonpartisan campaign for public office of that county, city or town, or any instrumentality thereof. House Journal, 43rd Legislature (1973-74), at 678, 1757. In the Senate, however, these provisions were eliminated. The Senate proposed a new version of the bill which included the present language of RCW 41.06.250(2) and (5); the House then passed the bill as amended by the Senate. House

Journal, 43rd Legislature (1973-74), at 4037-38.

Considerations of the legislative history of an enactment has long been held to be a legitimate method of determining the Legislature's intent. State v. Frampton, 95 Wn.2d 469, 477, 627 P.2d 922 (1981). Moreover, we have acknowledged the value in appropriate circumstances of considering sequential drafts of a bill. See The Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 450, 536 P.2d 157 (1975). It is presumed that members of the Legislature were aware of prior drafts of the bill at the time the 1974 amendments to RCW 41.06.250 were enacted. See Frampton, at 477-78. Therefore, it must be presumed that the Legislature did not intend to grant authority to political subdivisions of the state to prohibit or restrain their

employees from participating in partisan or nonpartisan campaigns.

Nevertheless, City contends that, because the rejected provisions would have permitted regulation of participation in both partisan and nonpartisan campaigns, the fact that the Legislature eliminated them in favor of the present language of RCW 41.06.250 indicates only that the Legislature intended to draw a distinction between partisan and nonpartisan political activity. City suggests no reason why such a distinction should be drawn.

If all political subdivisions of the state conducted nonpartisan campaigns, a partisan/nonpartisan distinction might serve to permit local autonomy with respect to regulation of employee political activity. However, such is not the case. We take judicial notice of the fact that some

political subdivisions, like King County, conduct partisan campaigns, whereas others, like City, conduct nonpartisan campaigns. Under City's interpretation of RCW 41.06.250, King County could prohibit its employees from participating in nonpartisan campaigns for office in other political subdivisions, but would have to allow employee participation in its own partisan campaigns. Meanwhile, City could prohibit employee participation in its nonpartisan campaigns for Bellevue city council, but could not in any way restrict its employees' partisan political activity. A statute must be given a reasonable construction to avoid absurd consequences such as these. State v. Cann, 92 Wn.2d 193, 595 P.2d 912 (1979).

The creation of meaningless distinctions between permitted and nonpermitted political activity is yet another absurd

consequence of City's interpretation of RCW 41.06.250. As even City seems willing to concede, RCW 41.06.250(2) affirms the right of all employees to vote and express their opinions on all political subjects and candidates. Assuming for the sake of argument that RCW 41.06.250 did not preempt BCC 3.90.050(B), employees would be faced with the task of determining which activities were "permissible" expressions of opinion, and which were "impermissible" participations in the political management or campaign of a candidate for Bellevue city council.

The Bellevue City Manager attempted to resolve this problem by issuing a memorandum setting forth examples of what City employees could and could not do:

> It is not a violation of the ordinance to:
>
> (1) Express your verbal or written opinion to fellow employees, neighbors or citizens on a Council candidate.

(2) Talk to a Council candidate regarding campaign issues.

(3) Attend meetings, open to the public generally, which are held by a candidate and ask questions of the candidate at such meeting.

(4) Post a campaign sign in your yard.

It is a violation of the ordinance to:

(1) Go door to door endorsing a candidate as a member of a campaign organization or under the direction of that organization.

(2) Prepare campaign signs or literature on behalf of a campaign organization.

(3) Speak on behalf of a candidate at a rally organized by a campaign.

(4) Attend a strategy planning meeting of a campaign organization.

Obviously, these guidelines cannot explicitly cover every possible situation. If you are in doubt about whether an activity is permissible, you should contact the City Manager's office.

Clerk's Papers, at 90-91.

Pursuant to the City Manager's memoran-

dum, a City employee could post a campaign sign in his yard; however, he would be subject to civil and criminal sanctions under BCC 3.90.060 if he painted that same campaign sign in the privacy of his own home on behalf of a "campaign organization." He could express his verbal opinion on a council candidate to his fellow citizens, but not from behind a podium at a campaign rally. We doubt that the Legislature intended that such artificial distinctions be drawn, or that the City Manager be the final arbiter of the exercise of constitutional rights of free speech and associations.

Accordingly, we hold that RCW 41.06.250 affirms the right of employees of this state and its subdivisions to participate fully in campaigns relating to constitutional amendments, referendums, initiatives,

and issues of a similar character, and for nonpartisan offices. BCC 3.90.050(B) conflicts directly with this provision of RCW 41.06.250, and is therefore preempted by the express terms of RCW 41.06.250(5).

Appellants also raise a number of constitutional challenges. They charge that BCC 3.90.050(B) not only violates the free speech and association guarantees of the state and federal constitutions, but is also unconstitutionally vague and overbroad. Moreover, they urge that if RCW 41.06.250 protected the right to participate in partisan, but not nonpartisan campaigns, it would violate the privileges and immunities clause of our state constitution, and the equal protection clause of the federal constitution. In view of our holding that RCW 41.06.250 preempts BCC 3.90.050(B), we need not and do not reach these constitu-

tional issues.

Appellants have requested that we award nominal damages and reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1983, 1988 (1981). Section 1988 gives this court the discretion to allow the prevailing party in an action to enforce § 1983 a reasonable attorneys' fee. Section 1983 provides in relevant part that every person who, under color of any statute or ordinance, subjects any United States citizen to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the injured party in an action at law. The violation of rights guaranteed solely by the state constitution and state law is not actionable under § 1983. Shutt v. Moore, 26 Wn. App. 450, 453, 613 P.2d 1188 (1980). Since our decision is based solely upon the ground that BCC 3.90.050(B)

violated RCW 41.06.250, appellants' request must be denied.

The trial court is reversed.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

BELLEVUE FIRE FIGHTERS LOCAL 1604, et al.,	)	
Plaintiffs,	)	NO. 81-2-14555-8
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
CITY OF BELLEVUE, a municipal corporation,	)	
Defendant.	)	

THIS MATTER having been heard before the Honorable David W. Soukup, October 7, 1982 and the plaintiffs having appeared by James H. Webster and the defendant having appeared by its City Attorney, Linda M. Youngs, and evidence having been submitted on affidavits and the court having reviewed the affidavits of Andrea W. Beatty, Nan Campbell, William Lagen, Michael Evered, Dru Briggs, Roy Ferguson, Cary Bozeman, Ron Pedee, and William Speith and having considered the memoranda, the pleadings and

the affidavits submitted in support of the preliminary injunction motion within the file, and the court being fully advised on this matter, the court hereby enters the following:

FINDINGS OF FACT

1. City of Bellevue is a noncharter code city incorporated pursuant to RCW Title 35A. Bellevue City Council elections are nonpartisan.

2. Bellevue Firefighters Local 1604, International Association of Firefighters, AFL-CIO, CLC is an unincorporated voluntary association and the bargaining representative for City of Bellevue firefighters pursuant to RCW 41.56.030(3).

3. Ron Pedee is a captain in the Bellevue Fire Department, a resident of the City of Bellevue and a registered voter.

4. William P. Speith is a resident of

Bellevue and a registered voter. He is not employed by the City of Bellevue.

5. The City of Bellevue adopted Ordinance No. 2436 in 1977. A section of that ordinance is codified as Bellevue City Code 3.90.050 and provides as follows:

> 3.90.050. Political Activities.
>
> B. No City employee shall take an active part in the political management or political campaign of a candidate for a position on the Bellevue City Council.
>
> C. Nothing in this section shall prevent an employee from fully exercising those rights to participate in political activities granted by the provisions of RCW 41.06.250.

6. In anticipation of the 1981 September primary and November general elections, the City Manager of the City of Bellevue, Andrea W. Beatty issued two memoranda outlining the limitations placed upon City employees by B.C.C. 3.90.050B. The first memorandum was issued June 5,

1981. This was overly broad. The second memorandum was substituted for the June 5, 1981 memo on October 12, 1981, correcting the defects in the June 5 memo. The City of Bellevue is now interpreting B.C.C. 3.90.050B under the provisions of the October 12, 1981 memo not the June 5, 1981 memo.

7. The October 12, 1981 memo correctly identifies the areas in which employees have statutorily and constitutionally protected rights and correctly identifies the areas the City of Bellevue has chosen to limit the rights of its employees. This memo further provides employees with a method by which they can seek clarification of the applications of B.C.C. 3.90.050B.

8. Under B.C.C. 3.90.050B and the October 12, 1981 memo, Bellevue City employees have the right to express their

opinions publicly and privately in any fashion they choose with respect to all political candidates, including cndidates for the Bellevue City Council. Bellevue City employees may not take an active part in the political management or political campaign of a Bellevue City Council candidate.

9. Bellevue has 740 full time salaried employees, 237 or 32% reside in Bellevue. There are 112 firefighters of whom 28 or 25% live within the city limits.

10. Bellevue City councilmembers believe that B.C.C. 3.90.050B as interpreted by the City Manager's October 12, 1981 memo protects substantial governmental and employee interests in particular: A) Governmental efficiency is fostered as employees can perform their jobs without being pressured to support specific council

candidates or to interpret regulations favorably to the councilmember's supporters; B) Public confidence in governmental integrity is fostered as the councilmembers will not be perceived to be making decisions in order to favor employee groups which lent them support in the campaign. The public can have confidence that councilmembers are making their best judgments on sensitive issues for the good of the public as a whole; C) Incumbent councilmembers or their opponents will not be able to draw upon organized employee groups to provide a powerful campaign machine; D) Employee performance and advancement can be judged without regard to prior political activity.

11. A preliminary injunction was issued October 15, 1981 enjoining the City of Bellevue from promulgating, enforcing, or

threatening to enforce any regulation, ordinance, or other directive prohibiting or restraining any employees of the City, in any way, from expressing their opinions on any political subject or candidate or from participating in any campaign for political office. An injunction bond in the amount of $750 was posted.

12. After the preliminary injunction was issued, Ron Pedee and Firefighters Local 1604 participated in the 1981 election campaigns of Bellevue City Council candidates by donating money individually and as a group and by doorbelling and making and distributing signs for candidates of their choice.

CONCLUSIONS OF LAW

1. R.C.W. 41.06.250(2) grants all state and local government employees the right to vote and to express their opinions

on all political subjects and candidates and to participate in the management of partisan political campaigns. B.C.C. 3.90.050B does not infringe upon the rights granted in R.C.W. 41.06.250(2).

2. R.C.W. 41.06.250(2) does not prohibit cities from placing reasonable restrictions upon its employees concerning their participation in nonpartisan municipal elections. B.C.C. 3.90.050B does not conflict with the second sentence contained in R.C.W. 41.06.250(2).

3. Governments may enact reasonable regulations to limit the participation of their employees in the management of political campaigns to foster governmental integrity and efficiency.

4. B.C.C. 3.90.050B is narrowly drawn so that the limitations it places upon the political activities of Bellevue employees

are necessary to promote governmental efficiency and integrity. Bellevue prohibits its employees from taking an active part in the political management or political campaign of candidates for Bellevue City Council only. These limitations are directly related to Bellevue's legitimate interests and Bellevue has shown a compelling state interest in enacting B.C.C. 3.90.050B to justify relatively nominal limitations on city employee political activities.

5. B.C.C. 3.90.050B and the City Manager's memorandum dated October 12, 1981 provide clear guidelines to employees concerning the restrictions placed on their conduct and are neither void for vagueness nor facially overbroad.

6. B.C.C. 3.90.050B does not violate state law nor the Washington State or United

States Constitutions.

7. The preliminary injunction issued October 15, 1981 was erroneously issued and must be lifted. No basis exists for the issuance of a permanent injunction.

Filed and entered December 7, 1983.

THE SUPREME COURT OF WASHINGTON

BELLEVUE FIRE FIGHTERS
LOCAL 1604, ET AL,

Appellants,

v.

THE CITY OF BELLEVUE,

Respondent.

No. 49257-3

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided by majority vote that the appellants' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Filed and entered August 21, 1984.

BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC, an unincorporated voluntary association, RON PEDEE, and WILLIAM P. SPIETH, Appellants, v. CITY OF BELLEVUE, a municipal corporation, Respondent.	MANDATE No. 49257-3 King County No. 812145558

The State of Washington to: The Superior Court of the State of Washington in and for King County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 12, 1984, became the decision terminating review of this court in the above entitled case on August 21, 1984. This cause is mandated to the superior court from which the appeal was taken for

further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $506.61 in favor of appellants and against respondent.

Order Denying Motion for Reconsideration was entered herein on August 21, 1984.

Filed and entered August 22, 1984.

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC, an unincorporated voluntary association, RON PEDEE, and WILLIAM P. SPIETH, Plaintiffs, vs. CITY OF BELLEVUE, a municipal corporation, Defendant.	No. 81-2-14555-8 FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

I. Identity of the Parties and Background.

1. Plaintiff Bellevue Fire Fighters, Local 1604, International Association of Fire Fighters, AFL-CIO, CLC, (the Union) is an unincorporated voluntary association and a "bargaining representative" within the meaning of R.C.W. 41.56.030(3).

2. Defendant City of Bellevue (the City)

is a municipal corporation of the State of Washington located in King County.

3. Plaintiff Ron Pedee is an individual and a registered voter who resides in and owns real property located in the City. Plaintiff Pedee is also employed by the City as a Captain in the Fire Department and is Vice President of the Union.

4. Plaintiff William P. Spieth is an individual and a registered voter who resides in and owns real property in the City.

5. The Union represents, for purposes of collective bargaining with the City concerning wages, hours and other terms and conditions of employment, a bargaining unit consisting of all employees employed in the City's Fire Department in the rank of Fire Fighter, Lieutenant and Captain. The bargaining unit includes approximately ninety employees, all but one of whom are members

of the Union.

6. On or about June 27, 1977, the City adopted Ordinance No. 2436, which added Chapter 3.90 to the Bellevue City Code. The ordinance provides pertinently as follows:

> 3.90.050. Political Activities.
>
> B. No City employee shall take an active part in the political management or political campaign of a candidate for a position on the Bellevue City Council.
>
> C. Nothing in this section shall prevent an employee from fully exercising those rights to participate in political activities granted by the provisions of RCW 41.06.250.
>
> 3.90.060. Penalties.
>
> (a) The violation or failure to comply with any of the provisions of this chapter is declared to be a misdemeanor, and upon conviction shall be punishable by a fine not exceeding three hundred fifty dollars, in addition to any other penalties authorized by law.
>
> (b) The City, through the authorized agents, may initiate appropriate civil action against any person who violates or fails to

comply with any provision of this chapter.

c) Any employee whose conduct is determined by the City Manager to be in violation of this chapter may be terminated from employment and/or temporarily, suspended with loss of pay up to and including 30 days by the City Manager.

7. On or about June 5, 1981, the City, by its City Manager, Andrea W. Beatty, distributed a memorandum to City's employees on the subject of the upcoming election campaign for three positions on the Bellevue City Council. A true and correct copy of such memorandum is attached hereto marked Exhibit "A". The memorandum states, in part, as follows:

"I would like to remind you that the City Employee Code of Ethics, adopted by City Council ordinance, does not allow any of us to actively participate in Council campaigns. By actively participating, I am referring to such activities as doorbelling, distributing literature, attending strategy meetings of candidates, meeting with individual candidates and any other participation which leaves the impression or gives the appearance

> of favoring a particular candidate(s). The Code of Ethics is for the protection of each of us and I ask you to strictly adhere to that legislation."

8. R.C.W. 41.06.250(2) guarantees to employees of political subdivisions of this State, "the right . . . to express their opinions on all candidates and to . . . participate in the management of a partisan political campaign" (emphasis added) and provides further that nothing in the section shall prohibit an employee of any political subdivision "from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for non-partisan offices" (emphasis added). R.C.W. 41.06.250(5) provides further that the section supersedes all ordinances and regulations of any subdivision of the State.

9. The office of Member of the Bellevue

City Council is a non-partisan office.

II. Declaratory Relief

10. A dispute exists between the Plaintiffs and the City, as follows:

A. The Plaintiffs contend that the City is prohibited by R.C.W. 41.06.250, Article I, Sections 3, 4, and 5 of the Constitution of the State of Washington, and Amendments I and 14 to the United States Constitution from restricting the active participation of City employees in the election campaigns for candidates for City Council; and the Defendant denies this contention; and

B. The Plaintiffs also contend that Section 3.90.050B of the Bellevue City Code, as interpreted and applied by the City, violates R.C.W. 41.06.250, Article I, Sections 3, 4, and 5 of the Constitution of the State of Washington, and Amendments 1

and 14 to the United States Constitution; and the Defendant denies this contention.

III. Injunctive Relief

9. The City has threatened criminal and civil prosecution and imposition of disciplinary sanctions up to and including discharge of City employees, including those represented by the Union, who express their opinions on candidates for Bellevue City Council or participate actively in the campaign of any such candidate, by doorbelling, distributing literature, attending strategy meetings of candidates, meeting with individual candidates, or any other participation which leaves the impression or gives the appearance of favoring a particular candidate.

10. The Union, its members, the employees of the City whom it represents, the individual plaintiffs, and the electorate of the

City generally will suffer irreparable harm for which there is no adequate legal remedy, unless the City is enjoined and restrained from enforcing or threatening to enforce any regulation, ordinance or other directive prohibiting employees of the City, in any way, from expressing their opinions on political subjects and candidates, or from participating in any campaign for political office.

IV. Damages and Attorneys Fees

11. By reason of the City's actions, as hereinabove alleged, the City has subjected Plaintiffs, under color of ordinance, regulation, custom and usage, to a deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States, and Plaintiffs have been forced to engage the services of their attorneys to vindicate such rights, privi-

leges and immunities and have otherwise been damaged in an amount to be proven at trial.

WHEREFORE, the Plaintiffs pray for judgment against the City as follows:

1. For a declaration that:

A. The City is prohibited by R.C.W. 41.06.250, Article I, Sections 3, 4, and 5 of the Constitution of the State of Washington, and Amendments 1 and 14 to the United States Constitution from restricting the active participation of City employees in the election campaigns for candidates for City Council; and

B. Section 3.90.050 B of the Bellevue City Code, as interpreted and applied by the City, violates R.C.W. 41.06.250, Article I, Sections 3, 4, and 5 of the Constitution of the State of Washington, and Amendments 1 and 14 to the United States Constitution;

2. For a preliminary injunction during the pendency of this action, to be made permanent after trial, enjoining and restraining the City, its officers, employees, and agents, from promulgating, enforcing, or threatening to enforce any regulation, ordinance, or other directive prohibiting or restraining any employees of the City, in any way, from expressing their opinions on any political subject or candidate or from participating in any campaign for political office;

3. For reasonable attorneys fees and damages in an amount to be proved at trial; and

4. For such other and further relief as the Court deems proper.

Filed October 15, 1981.

EXHIBIT "A"

CITY OF BELLEVUE

MEMORANDUM

Phone: 6810

Date: June 5, 1981

To: All Municipal Employees

From: Andrea W. Beatty, City Manager

Subject: City Council Campaign

1981 is an election year for municipal government. In Bellevue, three of the seven City Council seats will be before the voters for election. These seats are currently held by Mayor Richard Foreman, Mayor pro tem Mab Tocher and Councilman Cary Bozeman. The filing for Council seats is between Monday, July 27 and Friday, July 31. The primary election will be September 15 and the general election will be November 3.

Since the campaign is already underway, I would like to remind you that the City

Employee Code of Ethics, adopted by City Council ordinance, does not allow any of us to actively participate in Council campaigns. By actively participating, I am referring to such activities as doorbelling, distributing literature, attending strategy meetings of candidates, meetings with individual candidates and any other participation which leaves the impression or gives the appearance of favoring a particular candidate(s). The Code of Ethics is for the protection of each of us and I ask you to strictly adhere to that legislation.

I anticipate that staff members will be receiving inquiries from candidates and/or their staff members during the campaign. I want our responses to be coordinate and disseminated from a central point in order to assure consistency and accuracy, as well as responding in a expeditious manner.

To accomplish this, I have designated Mr. Doug Schmitz, Assistant City Manager, to be the responsible staff contact for all Council candidate inquiries. It will be his responsibility to respond to any requests for information and to serve as the contact point for the candidates.

I would like all requests for information from candidates or members of their campaign staffs to be directed to Mr. Schmitz. Should you directly receive any requests for information from a Council candidate or members of their staff, please inform Mr. Schmitz immediately and provide him with the necessary information so that a response can be provided.

Should you have any questions or receive any direct inquiries from Council candidates or members of their staff, please contact Mr. Schmitz at 455-6810.

Office-Supreme Court, U.
FILED
JAN 17 1985
ALEXANDER L. STEVAS
CLERK

No. 84-976

In The
Supreme Court of the United States
October Term, 1984

BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC, an unincorporated voluntary association; RON PEDEE, and WILLIAM P. SPIETH,

Petitioners,

vs.

CITY OF BELLEVUE, a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Must a state court act on a party's request for attorney fees under 42 USC § 1988, where relief was granted solely under state law, and a lower court's denial of a Federal Constitutional claim was not reversed?

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STATEMENT OF THE CASE

In October, 1981, the Petitioners herein commenced an action in the Superior Court of the State of Washington naming the Respondent, the City of Bellevue, a defendant and challenging the validity of the City's ordinance prohibiting City employees from taking an active part in City Council election campaigns, alleging that the ordinance was in conflict with a state statute and violated sections of the state constitution as well as the First and Fourteenth Amendments of the U.S. Constitution. Petitioners sought injunctive relief and, in their First Amended Complaint, included a prayer for "reasonable attorneys fees and damages in an amount to be proved at trial." (First Amended Complaint p. 7; Petition, p. 42a.)

Petitioners include a Bellevue firefighter, the labor organization which represents the firefighters, and a Bellevue citizen who wished to receive political information from City employees.

The challenged Bellevue City Code section, BCC 3.90.050, read in part as follows:

> B. No city employee shall take an active part in the political management or political campaign of a candidate for a position on the Bellevue City Council.
>
> C. Nothing in this section shall prevent an employee from fully exercising those rights to participate in political activities granted by the provisions of RCW [Revised Code of Washington] 41.06.250.

This ordinance was interpreted in a memorandum from the City Manager to City employees, which is quoted in the Appendix to the Petition herein, at 14a-15a.

The statute referred to explicitly grants certain rights to public employees:

> Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices. RCW 41.06.250(2)

Petitioners' request for a preliminary injunction was heard and granted by Judge Jim Bates of the Superior Court on October 15, 1981. On October 7, 1982, the case was submitted on affidavits to Judge David Soukup of that court. Judge Soukup ruled that, under the interpretation given the ordinance in the City Manager's memo, there was no conflict with the state statute or the constitutional provisions, and lifted the preliminary injunction. (See Petition, pp. 28a-29a.)

Petitioners appealed to the Supreme Court of the State of Washington. They again sought an interim injunction, which was denied; but on hearing the appeal the court reversed the decision below in a brief order stating that BCC 3.90.050 (B) was declared invalid. Petitioners filed a cost bill, and an affidavit requesting award of attorneys' fees in the sum of $87,328.15. Respondent filed a memorandum in opposition to the award of fees.

The State Supreme Court issued its full opinion on January 12, 1984, denying fees because the decision was

based solely on state law. *Bellevue Fire Fighters v. Bellevue,* 100 Wn2d 748, 756, 675 P2d 592 (1984). Petitioners' motion for reconsideration was denied, and they have sought a Writ of Certiorari in this Court.

———o———

ARGUMENT

A. THE CIVIL RIGHTS ATTORNEYS FEE ACT DOES NOT AUTHORIZE AN AWARD OF FEES WHERE NO RELIEF WOULD BE GRANTED UNDER FEDERAL LAW.

Respondent does not deny that attorney's fees may be granted under 42 U.S.C. § 1988 on a claim under state law, where that claim arises from facts which would, or probably would, merit relief under appropriate federal law. It is Respondent's position, however, that not every complaint that alleges a constitutional violation gives rise to an award of attorney's fees; such a rule would ultimately require, rather than avoid, needless determination of issues from which courts currently abstain. If a mere untried allegation were to suffice, every claim brought to court would contain one for the sake of obtaining fees, and economics would make sure that all were litigated.

What is required instead is that the claim be "substantial". This avoids frivolous claims but allows a court to grant the relief authorized by the Civil Rights Act without necessarily reaching the merits of difficult constitutional issues. Petitioners in this action cite a number of cases where non-fee claims were joined with claims that were "substantial", or even were adjudged to be so; none of

these is authority for awarding fees in the case where the civil rights claim is invalid, and has been adjudged to be so.

1. The Federal Cases Involving Pendent Claims Cited by Petitioners Are Easily Distinguished.

A Federal District Court granting relief on a pendent state-law claim has already made a determination of "substantiality," for the latter is a prerequisite of jurisdiction. See for instance, *Kimbrough v. Arkansas Activities Association,* 574 F.2d 423 (8 Cir 1978). Petitioners cite this case on pp. 29-30 of their petition among "numerous decisions of federal courts of appeal in which, having never reached the substantial federal constitutional claims because relief was granted on state law claims. . . ." The District Court for the Eastern District of Arkansas had ruled that the challenged regulations of the defendant corporation did not actually prohibit the plaintiff from participating in interscholastic football, and therefore it did not reach his due process and equal protection claims. The District Court denied his claim for attorney's fees, but the Court of Appeals reversed the denial and remanded. The basis for the reversal is that the question of "substantiality" had already been answered:

> Without the existence of a substantial federal claim, no federal pendent jurisdiction over the non-federal claim exists. *Hagans v. Lavine,* 415 U.S. 528, 536-539, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *United Mine Workers v. Gibbs,* 383 U.S. 715, 722-725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Since the District Court in the instant case invoked jurisdiction and disposed of the case on non-federal grounds, it implicitly made the initial determination that the allegations of the com-

> plaint raised a substantial constitutional claim sufficient to confer jurisdiction. See *Hagans v. Lavine, supra,* 415 U.S. at 538, 94 S.Ct. 1372; *Edward Kuhn v. National Association of Letter Carriers,* 570 F.2d 757, 760 (8th Cir. 1978). We, therefore, conclude that the requirements for a discretionary award of attorney's fees as set forth by the House Judiciary Committee have been met.

Kimbrough, supra, 574 F.2d at 427. See also, *Seals v. Quarterly County Court,* 562 F.2d 390, 392 (6 Cir. 1977) (plaintiff's federal constitutional claims "previously described as 'substantial'" by court); *Williams v. Thomas,* 692 F.2d 1032 (5 Cir. 1982) (federal claim denied by jury, but under erroneous instruction).

Trial in a federal court of a case such as the one at bar will always imply that a court has determined that a substantial federal question is presented. A state court's decision not to award attorney's fees does not necessarily include such a ruling and is therefore not in conflict with those decisions.

2. The State Court Cases Cited Are Also Based On Substantial Constitutional Questions.

Petitioners have cited a number of state appellate court decisions in which attorney's fees have been awarded to a prevailing party despite the fact that a 1983 claim was not decided on its merits. Each of these, like the Federal decisions, contains a holding, explicit or implicit, that the Federal claim was a substantial one meriting fees.

In *Draper v. Town Clerk of Greenfield,* 384 Mass. 444, 425 N.E. 2d 333 (1981), the court awarded fees to a plaintiff who had challenged a state law under both State and Federal equal protection grounds. The trial judge had

decided the case on the basis of statutory interpretation, but the Supreme Judicial Court of Massachusetts, in awarding fees, focused on the substantiality of the constitutional claim:

> The single justice noted in his decision accompanying the preliminary injunction that the State defendants were "unable to articulate *any* intelligible purpose" served by their reading of the statute, which, given even minimal Fourteenth Amendment scrutiny, would seem to raise some constitutional problems; furthermore, he noted that the State defendants conceded the presence of "substantial constitutional questions."
>
> *Draper, supra* at 425 N.E. 2d 339.

Likewise, in *Davis v. Everett,* 443 So.2d 1232 (Ala. 1983), the trial court found that the defendants had violated the plaintiff's equal protection rights.

> It is not necessary here to equate equal protection under the Constitution of 1901, Art. I, §§ 1, 6, and 22, with equal protection under the United States Constitution for all purposes; however, the Alabama Constitution necessarily embraces at least the minimal requirements of the United States Constitution. Defendants violated plaintiff's equal protection rights under the Alabama Constitution. It may also follow that plaintiff's federal constitutional rights were violated; she alleged a substantial federal claim, which was not dismissed, and ultimately prevailed on her state constitutional claim. The *Gibbs* test was satisfied because both claims arose from a common nucleus of operative facts. Accordingly, Mrs. Davis was a prevailing party under § 1988.

Davis, supra, at p. 1236. *Davis* distinguishes another Alabama case, *Still v. Personnel Board of Jefferson County,* 406 So.2d 860 (Ala. 1981), where attorney's fees were denied because a lower court judge, though granting relief

on state law grounds, specifically denied the federal claim. See also *Right to Choose v. Byrne,* 91 N.J. 287, 450 A.2d 925 (1982); *Robinson v. City of Raytown,* 606 S.W. 2d 460 (Mo. App 1980); *Brown v. Hornbeck,* 458 A.2d 900 (Mo. App 1983).

3. Maher v. Gagne Provides No Criticism Of The Decision Below.

Both *Maher v. Gagne,* 448 U.S. 122 (1980), and the case it follows, *Maine v. Thiboutot,* 448 U.S. 1 (1980), hold that an award of attorney's fees is proper when a plaintiff prevails on a § 1983 claim, although a Federal Constitutional claim is not reached; further, as the Petitioners point out, the latter case so holds in the setting of an action brought in state court, like the case at bar. However, the reason for those holdings does not appear in this case.

In neither *Maher* nor *Thiboutot* were fees awarded for prevailing on a state claim pendent to a substantial constitutional claim. Instead, in each case the plaintiff had succeeded in showing a violation of a section of the Social Security Act, 42 U.S.C. § 602 (a)(7). The explicit holding of the two cases is that the Federal claim, under the Social Security Act, is one which can be brought under 42 U.S.C. § 1983, and one for which attorney's fees can be awarded under § 1988. These decisions have no relevance to a case where the plaintiffs do not prevail on their § 1983 claims.

B. PETITIONERS' CLAIM UNDER 42 USC § 1983 WAS PROPERLY DENIED.

The case at bar differs from those cited by the Petitioners where fees were awarded after a finding that a

"substantial" constitutional claim existed. As discussed above, that finding is either explicit (in the state court cases) or implicit (in those opinions where Federal jurisdiction was premised on the existence of a "substantial" question).

Instead, this case is like *Draper v. Town Clerk of Greenfield,* 384 Mass. 444, 425 N.E. 2d 333 (1981), discussed *supra,* p. 5, in that a lower court specifically denied Petitioner's Constitutional claim. The Supreme Court of the State of Washington declined to disturb this ruling on appeal, and thus the only existing judicial determination on the subject is that the § 1983 claim is invalid. Award of attorney's fees following such a determination is supported by no authority which has been cited.

Relief on the Petitioners' § 1983 claim would have to be denied under this Court's decisions in *United Public Workers v. Mitchell,* 330 U.S. 75 (1947), *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO,* 413 U.S. 548 (1973), and *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), for those decisions deal with the same Constitutional challenges, but applied to the Hatch Act, 5 USC § 7324, which contains a similar prohibition against taking an active part in political management or political campaigns. The regulation imposed by the City of Bellevue applied to nonpartisan political campaigns, because elections for City Council are by definition nonpartisan; thus, they bore the same rational relationship to their goals of preventing unwanted influence as the rules against partisan campaigning upheld elsewhere. See *Wachsman v. City of Dallas,* 704 F.2d 160 (5th Cir 1983), *cert. denied,* 104 S.Ct. 537.

Wachsman considered a challenge by Dallas police and firemen to two sections of that city's charter which contained limitations similar to, and in some respects broader than, those in the Bellevue ordinance. The court declined the proffered distinction, that the Hatch Act cases deal only with partisan politics, seeing the references to partisan activity in *Letter Carriers* as a result of the focus of that opinion on the nature of Federal electoral politics.

> An across-the-board constitutional distinction for these purposes between "partisan" and "nonpartisan" elections to local legislative and executive type offices seems questionable on other grounds as well. We doubt that such human traits as personal ambition, greed, fear, and the like, on the one hand, and commitment to principle unselfishness, honor, and similar characteristics, on the other hand, are distributed among such candidates and their supporters in significantly different proportions according to whether the election by which they are chosen is "partisan" or "nonpartisan". *Wachsman, supra,* at pp. 167-168.

Without the partisan-nonpartisan distinction to rely upon, the plaintiffs in *Wachsman* saw the court uphold the City's ability to prohibit employees from making financial contributions to City Council candidates, from making public endorsements in certain situations, from circulating (though not signing) endorsement petitions, from soliciting contributions, and even from some participation in other elections. The Petitioners in this action likewise have no constitutional claim after the misleading partisan-nonpartisan distinction is disposed of.

———o———

CONCLUSION

The Supreme Court of the State of Washington declared the City of Bellevue's ordinance on political activity by employees to be in conflict with a state law. In doing so, it left untouched a determination by the trial court that there was no violation of 42 USC § 1983. That determination is a correct one: if the Hatch Act is not unconstitutional, neither was the Bellevue ordinance.

Attorney's fees may be awarded under 42 USC § 1988 only where there is found to be a violation of § 1983, or a "substantial" claim. There is no authority that an invalid claim, such as that of the Petitioners', may be a "substantial" one. No conceivable public policy could be advanced by making an invalid claim a "substantial" one. The decision of the Washington Supreme Court regarding the award of attorney's fees is not in conflict with a decision of this court, or any state or federal court.

The petition for certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
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JAN 22 1985
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CLERK

NO. 84-976 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BELLEVUE FIRE FIGHTERS LOCAL 1604,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO, CLC,
an unincorporated voluntary association;
RON PEDEE, and WILLIAM P. SPIETH,
Petitioners,

vs.

CITY OF BELLEVUE, a municipal corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF OF PETITIONER

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NO. 84-976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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Petitioners,

vs.

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-976

BELLEVUE FIRE FIGHTERS LOCAL 1604,
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Petitioners,

v.

CITY OF BELLEVUE, a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF OF PETITIONERS

---

1. Introduction.

In the Brief of Respondent in Opposition to the Petition for a Writ of Certiorari, respondent concedes that attorneys' fees

may be granted under 42 U.S.C. § 1988 on a claim under state law, where that claim arises from facts that would also create a substantial claim under appropriate federal law. Respondent's Brief, p. 3.

Respondent argues, however, that "the only existing judicial determination" of petitioners' constitutional claims is the denial of those claims by the superior court that, respondent states, the Washington Supreme Court "declined to disturb . . . on appeal." Id., p. 8. Respondent also asserts that petitioners' constitutional claims are not substantial in view of Wachsman v. City of Dallas, 704 F.2d 160 (5th Cir. 1983), cert. denied, 104 S.Ct. 537 (id., pp. 8-9). Finally, respondent contends that "[n]o conceivable public policy could be advanced" by treating petitioners' claims as substantial (id., p. 10).

Pursuant to Rule 22.5 of this court, each of these arguments is addressed below.

2. The Trial Court's Ruling on Petitioners' Constitutional Claims was Reversed by the Supreme Court of Washington.

The dispositive statement by the Supreme Court of Washington in this case is that "[t]he trial court is reversed." Appendix to the petition herein, p. 19a (hereafter "App."). Although the court ruled that it "need not and do[es] not reach" petitioners' constitutional claims regarding free speech and association, vagueness and overbreadth, and equal protection (App. 17a-18a), its reasoning in support of its interpretation of RCW 41.06.250 expressly deals with these constitutional concerns.

The court below reasoned that the res-

pondent's interpretation of RCW 41.06.250 would produce "absurd consequences" by recognizing a distinction between partisan political activities that are protected by the statute and nonpartisan political activities that respondent urged could be restricted,[1] and create "meaningless dis-

---

[1]The court stated:

> We take judicial notice of the fact that some political subdivisions, like King County, conduct partisan campaigns, whereas others, like City, conduct nonpartisan campaigns. Under City's interpretation of RCW 41.06.250, King County could prohibit its employees from participating in nonpartisan campaigns for office in other political subdivisions, but would have to allow employee participation in its own partisan campaigns. Meanwhile, City could prohibit employee participation in its nonpartisan campaigns for Bellevue city council, but could not in any way restrict its employees' partisan political activity. A statute must be given a reasonable construction to avoid absurd consequences such as these.

App. 12a-13a, emphasis in last sentence added.

tinctions between permitted and nonpermitted political activity . . . ."[2] Rejecting the

---

[2]The court stated:

> The creation of meaningless distinctions between permitted and nonpermitted political activity is yet another absurd consequence of City's interpretation of RCW 41.06.250.
>
> * * *
>
> Assuming for the sake of argument that RCW 41.06.250 did not preempt BCC 3.90.050(B), employees would be faced with the task of determining which activities were "permissible" expressions of opinion, and which were "impermissible" participations in the political management or campaign of a candidate for Bellevue city council.
>
> The Bellevue City Manager attempted to resolve this problem by issuing a memorandum setting forth examples of what City employees could and could not do[.]
>
> * * *
>
> Pursuant to the City Manager's memorandum, a City employee could post a campaign sign in his yard;

likelihood that the legislature could have intended such "absurd consequences" and "meaningless distinctions" among permitted and nonpermitted political activities, the court concluded,

> We doubt that the Legislature intended that such artificial distinctions be drawn, or that the City Manager be the final arbiter of the exercise of constitutional rights of free speech and association.

App. 16a, emphasis added.

Artificial distinctions in the otherwise permissible regulation of free speech

---

> however, he would be subject to civil and criminal sanctions under BCC 3.90.060 if he painted that same campaign sign in the privacy of his own home on behalf of a "campaign organization." He could express his verbal opinion on a council candidate to his fellow citizens, but not from behind a podium at a campaign rally.

App. 13a-16a.

and association also violate constitutional guarantees of equal protection. See, e.g., Carey v. Brown, 447 U.S. 456 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

In view of the court's reasoning concerning "constitutional rights of free speech and association" and their bearing on the proper construction of RCW 41.06.250, this Court should reject respondent's assertion that the state supreme court "declined to disturb" the ruling of the trial court on petitioners' constitutional claims. Such an assertion also carries the unreasonable implication that, notwithstanding the "meaningless distinctions" and "absurd consequences" resulting from the trial court's judgment, the Washington Supreme Court intended to allow the reversed judgment to serve as precedent on constitu-

tional issues it determined that it did not need to reach.

3. The Petitioners' Constitutional Claims Were Properly Recognized by the Supreme Court of Washington As Substantial.

As is apparent from the discussion in Part 2 above, the Washington Supreme Court recognized the substantiality of petitioners' constitutional claims concerning free speech and association, vagueness and overbreadth, and equal protection. Respondent argues, however, that relief on these claims would have to be denied under earlier decisions of this Court, citing United Public Workers v. Mitchell, 330 U.S. 75 (1947); United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973); and Broadrick v. Oklahoma, 413 U.S. 601 (1973). In those

decisions the Court upheld against constitutional challenge certain restrictions on partisan political campaign activities by civil service employees of the United States and the State of Oklahoma.

Two federal courts of appeals and one federal district court have interpreted these three decisions to permit restrictions only on certain partisan political activity. Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3rd Cir. 1974), cert. denied, 419 U.S. 844; Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977), cert. denied, 434 U.S. 1063; Arden v. Village of Oak Lawn, 537 F.Supp. 181 (N.D. Ill. 1982). Another federal court of appeals has reached a conflicting result. Wachsman v. City of Dallas, supra.

A conflict on a constitutional issue among the federal courts of appeals is one

hallmark of substantiality. Cf. U. S. Supreme Court Rule 17.1(a). Moreover, in light of the protection granted by the Washington Legislature to the partisan political activities of all state and local governmental employees, this case posed far graver questions concerning constitutional equal protection guarantees than were raised in Mitchell, supra; Letter Carriers, supra; or Broadrick, supra.

By its reliance on Wachsman, supra, the respondent in effect invites this Court to resolve summarily a constitutional issue that it has three times declined to accept for review, and the merits of which have been rendered moot in this case by the decision of the Washington Supreme Court. It was to avoid precisely such an invitation, where only attorneys' fees remained at issue in civil rights cases, that

Congress determined to grant fees under § 1988 to parties who have prevailed on non-fee-producing claims.

4. Policy Concerns Require that Petitioners' Claims be Treated as Substantial.

Respondent states (p. 5) that [t]rial in a federal court of a case such as the one at bar will always imply that a court has determined that a substantial federal question is presented", and that "[a] state court's decision not to award attorney's fees does not necessarily include such a ruling . . . ." It is precisely for that reason that, unless certiorari is granted in this case and the decision below reversed, civil rights plaintiffs will have no choice but to bring their complaints in federal court, in order that success on their state law claims will not result in a denial of

their attorneys' fees.

Yet, as the circumstances of this case demonstrate, the state courts are better tribunals in which to litigate claims that can be resolved by interpreting state law and avoid unnecessary federal constitutional decisions. At the time this action was brought, RCW 41.06.250(2) had never been interpreted by a state court in any reported decision. The state attorney general had published an opinion, however, that the statute permitted municipalities to regulate the nonpartisan election campaign activities of their employees (App. 4a, fn. 1).

Under these circumstances, a federal district court might have been unwilling to interpret the statute to preclude such regulation. If so, it would have been

required either to decide the constitutional issues that the state court found unnecessary to reach, or to abstain pending an authoritative state court determination. Thus the resolution of the statutory issues and the prompt disposition of this case on non-constitutional grounds was facilitated by bringing it in the state court in the first instance.

Civil rights plaintiffs like petitioners should not be discouraged from bringing cases with both constitutional and state law issues in the state courts. Not only are the state courts better able to adjudicate the state law claims, but they are also fully capable of evaluating the substantiality of the federal claims presented in connection with requests for attorneys' fees under § 1988.

5. Conclusion.

For the reasons stated herein and in the Petition for a Writ of Certiorari, the petition should be granted, the decision below vacated, and the case remanded to the Washington Supreme Court for reconsideration in light of Maher v. Gagne, 448 U.S. 122 (1980).

Alternatively, the Court should grant the petition and set the case down for plenary review.

Respectfully submitted,

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